UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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KATHLEEN NICHOLS, Plaintiff, v. JAMES L. HAGER, in his official capacity and individual capacity; LAURA DANCER, in her official capacity and individual capacity; and WASHOE COUNTY SCHOOL DISTRICT, a political subdivision of the State of Nevada, Defendants.	03:04-CV-00559-LRH-LRL ORDER

Presently before the court is a Motion for Partial Summary Judgment (# 37[1]) filed by defendants James L. Hager, Ph.D., Laura Dancer, and the Washoe County School District (collectively, "Defendants"). Plaintiff Kathleen Nichols ("Nichols") has filed an opposition (# 57), and Defendants replied (# 57).

I. Factual Background

In 1998, Jeffrey Blanck ("Blanck"), the former General Counsel to the Washoe County School District (the "District"), hired Nichols as his administrative assistant in the District's legal

[1]Refers to the court's docket number.

department. On January 16, 2004, Blanck was suspended from his position as General Counsel. On March 23, 2004, Nichols attended a public school board meeting. Nichols sat next to Blanck during the meeting.

Prior to the March 23, 2004, meeting, defendant Laura Dancer ("Dancer") told Nichols that Nichols would retain her position as an administrative assistant to the legal division. The following day, March 24, 2004, Dancer informed Nichols that Nichols would not return to the legal division because Dancer questioned Nichols's loyalty to the school district. Dancer further informed Nichols that Nichols could have one of two positions in the personnel division and that her salary would be temporarily frozen. Nichols subsequently retired from her position on April 1, 2004.

II. Legal Standard

Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In assessing a motion for summary judgment, the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001).

The moving party bears the burden of informing the court of the basis for its motion, along with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of proof, the moving party must make a showing that is "sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986); *see also Idema v. Dreamworks, Inc.*, 162 F.Supp.2d 1129, 1141 (C.D. Cal. 2001). For those issues where the moving party will not have the burden of proof at trial, the movant must point out to the court "that there is an absence of evidence to support the nonmoving party's case." *Catrett,*

477 U.S. at 325.

In order to successfully rebut a motion for summary judgment, the non-moving party must point to facts supported by the record which demonstrate a genuine issue of material fact. *Reese v. Jefferson School Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000). A "material fact" is a fact "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Where reasonable minds could differ on the material facts at issue, summary judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A dispute regarding a material fact is considered genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient to establish a genuine dispute; there must be evidence on which the jury could reasonably find for the plaintiff. *See id.* at 252.

III. Discussion

In the present motion, Defendants seek summary judgment on Nichols's first and eighth claims for relief. Nichols's first claim for relief alleges retaliation for the exercise of her First Amendment right to freedom of association. Nichols's eighth claim for relief alleges that defendants Dancer and James L. Hager, Ph.D. ("Hager") made false and defamatory statements concerning Nichols. The court will address each cause of action separately.

A. First Amendment Retaliation

Defendants argue that Nichols's First Amendment claim fails because Nichols was a confidential employee. Alternatively, Defendants argue that Nichols's association with Blanck did not involve a matter of public concern. Finally, Defendants argue that, to the extent Nichols is not a confidential employee and did associate with Blanck on a matter of public concern, the District has a legitimate interest in maintaining the integrity of and avoiding disruption in the legal department that outweighs Nichols's right to associate with Blanck. Nichols argues that she is not

a confidential employee because politics played no role in the performance of her job duties. Nichols further argues that she has set forth all elements constituting her first cause of action.

A cause of action involving the right of association is analyzed under the framework used for claims involving speech. *See Hudson v. Craven*, 403 F.3d 691, 698 (9th Cir. 2005). Therefore, in order to establish a prima facie case of retaliation, a public employee must show the following: (1) she engaged in protected speech; (2) the defendants took an adverse employment action against her; and (3) her speech was a substantial motivating factor for the adverse employment action. *Thomas v. City of Beaverton*, 379 F.3d 802, 807-08 (9th Cir. 2004).

"[A] threshold inquiry in a claim for First Amendment retaliation is whether the employee was a policymaking or confidential employee." *Blanck v. Hager*, 360 F.Supp.2d 1137, 1148 (D. Nev. 2005). Whether an employee is a policymaking or confidential employee is a mixed question of fact and law. *Walker v. City of Lakewood*, 272 F.3d 1114, 1132 (9th Cir. 2001). "Determining the particular duties of a position is a factual question, while determining whether those duties ultimately make that position a policymaking or confidential question is a question of law." *Id*. The question that must be decided is "'whether the hiring authority can demonstrate that [politics] is an appropriate requirement for the effective performance of the public office involved.'" *Hobler v. Brueher*, 325 F.3d 1145, 1152 (9th Cir. 2003) (quoting *Fazio v. City & County of San Francisco*, 125 F.3d 1328, 1333 (9th Cir. 1997)). The analysis of whether an employee should be considered a confidential employee or policymaker is not limited to party affiliation, but applies more broadly to political beliefs, expression, and support. *Id*. at 1149.

In *Hobler v. Brueher*, the Ninth Circuit considered whether two secretaries who were fired by a newly elected prosecutor were confidential employees. 325 F.3d at 1149-52. The *Hobler* court noted that most offices have "key personnel who aren't policymakers . . . but who are critical to effective policy implementation, and whose loyalty and confidentiality are necessary." *Id*. at 1151. The court continued, "[i]t is hard to run any sort of office without certain employees who

work so closely with the outgoing boss that any incoming boss must have the option of picking his or her own people for that position." *Id*. at 1152. Under the circumstances of that case, the *Hobler* court found that the two secretaries held positions as such key personnel. *Id*. The two secretaries were in such a position that they functioned as the prosecutor's conduit for the most sensitive information. *Id*. at 1152.

The two secretaries had duties that included advising the prosecutor on whom to hire, giving the prosecutor confidential notes of what was said at meetings, serving as a witness to sit in on sensitive conversations, reporting to the prosecutor on performance issues relating to the office's attorneys, administering payroll, and serving as a liaison between the elected official and the balance of the populace. *Id*. at 1147. Thus, the *Hobler* court found that loyalty was "an appropriate requirement for the effective performance of the public office involved. *Id*. at 1152. In reaching that conclusion, the court stated, "[w]ithout a confidential secretary the official can trust to carry out his views, funnel communications in and out according to his priorities, and represent him in a way that enhances rather than damages his reputation, an elected official cannot effectively perform his office." *Id*.

The court finds the case at bar analogous to *Hobler* in that Nichols was a confidential employee. Nichols's position required her to perform difficult and highly responsible secretarial work. (Defs.' Mot. for Partial Summ. J. (# 37), Dep. of Kathleen Nichols, Ex. 1 at 44:9-15.) Nichols was further required to frequently exercise independent judgment in applying and interpreting district or division policies, regulations and procedures. *Id*. at 44:16-20. Nichols's job description provided that she would serve "as the primary administrative assistant to the school district attorney, providing support in district legal matters which may involve, but are not limited to, litigation, arbitration, due process hearings, employee and student complaints, personal injury, student records and district contact reviews." (Pl.'s Opp'n to Defs.' Mot. (# 54), Nichols's Job Description, Ex. 6.) Nichols was further "[a]ccountable for upholding strict rules and guidelines of

confidentiality." *Id.*

The District questioned Nichols's loyalty to the school district after Nichols sat next to Blanck at the March 23, 2004, meeting. (Pl.'s Opp'n to Defs.' Mot. (# 54), Dep. of Kathleen Nichols, Ex. 1 at 123:16-22.) In fact, the evidence shows that Nichols had discussed Blanck's employment situation with Blanck on several occasions between November 19, 2003, and January 16, 2004. (Defs.' Mot. for Partial Summ. J. (# 37), Dep. of Kathleen Nichols, Ex. 1 at 79:5-13.) Furthermore, Nichols, as Blanck's administrative assistant, prepared documents for Blanck to present to the Washoe County school trustees relating to Blanck's dispute with the District. *Id.* at 65:17-23. The evidence further shows that Nichols told Blanck, on the day he left, that outside counsel and Dancer would be beginning work and reviewing files the following week. (Pl.'s Opp'n to Defs.' Mot. (# 54), Dep. of Laura Dancer, Ex. 3 at 55:12-22.) At the very least, Nichols's association with Blanck creates an inference that Nichols may have supported Blanck as opposed to the District.

Looking at these facts in the light most favorable to Nichols, the court finds that loyalty is "an appropriate requirement for the effective performance of the public office involved." *See Hobler*, 325 F.3d at 1152. The District was entitled to have a legal department in which its general counsel's administrative assistant was loyal to the district and an administrative assistant that the District could trust to handle sensitive legal matters. As a matter of law, Nichols was a confidential employee and is therefore not entitled to claim First Amendment retaliation under the circumstances which are before the court. Defendants motion for summary judgment will be granted with regard to Nichols's first claim for relief.

B. Defamation

Defendants seeks summary judgment on Nichols's defamation claim arguing that Nichols cannot show a false and defamatory statement by a defendant or that there was an unprivileged publication to a third person. In opposition to summary judgment, Nichols argues that Defendants'

motion for summary judgment contains false and defamatory statements that were published to a third person because they are contained in a public document.

"The general elements of a defamation claim require a plaintiff to prove: '(1) a false and defamatory statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.'" *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 90 (Nev. 2002) (quoting *Chowdhry v. NLVH, Inc.*, 851 P.2d 459, 462 (Nev. 1993)).

In this case, Nichols has not identified any alleged false and defamatory statement other than certain statements contained in Defendants' motion for summary judgment. However, the actual defamation claim raised in Nichols's complaint relates to alleged false and defamatory statements made by Dancer and Hager related to accusing Nichols of being disloyal. This defamation claim must fail. In her deposition, Nichols acknowledged that she had no knowledge that the alleged defamatory statement was ever communicated to anyone else. (Defs.' Mot. for Partial Summ. J. (# 37), Dep. of Kathleen Nichols, Ex. 1 at 136:9-137:4.) Furthermore, a defamation claim cannot lie from alleged defamatory statements contained in Defendants' motion for partial summary judgment. *See Fink v. Oshins*, 49 P.3d 640, 643-44 (Nev. 2002). For these reasons, summary judgment will be granted.

Defendants are also seeking sanctions against Nichols for their "excess costs, expenses, and attorney's fees" incurred in defending against this claim. Although it appears to the court that Nichols's defamation claim may be frivolous, the court will not impose sanctions because Nichols's defamation claim played a *de minimis* role in this action.

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IT IS THEREFORE ORDERED that Defendants' Motion for Partial Summary Judgment (# 37) is hereby GRANTED.

IT IS SO ORDERED.

DATED this 29th day of March, 2007.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE